



IAC-BH-PMP-V1

**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: IA/43671/2013

THE IMMIGRATION ACTS

**Heard at Bennett House, Stoke
On 30th June 2015**

**Decision & Reasons Promulgated
On 21st July 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE GARRATT

Between

**JILLENE LOUISE GARNER
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms S Lee, Solicitor of Salam & Co Solicitors

For the Respondent: Mr A McVeety, Senior Home Office Presenting Officer

DECISION AND REASONS

Background

1. In a decision sent out on 26th February 2014 Judge of the First-tier Tribunal Pooler dismissed the appeal against the decision of the respondent to refuse further leave to remain as a partner and on human rights grounds applying the provisions of Appendix FM and paragraph 276ADE of the Immigration Rules. An application made to the First-tier Tribunal to appeal against that decision was refused by Designated Judge Campbell on 18th March 2014 and a subsequent application to the Upper Tribunal was dismissed by Upper Tribunal Judge Goldstein on 23rd April 2014.

2. However, on 30th April 2015, the High Court quashed the decision of the Upper Tribunal to refuse permission to appeal. That followed the grant of permission to apply for judicial review by Mr Justice Blake which is dated 21st January 2015.
3. Mr Justice Blake observed that, although the appellant could not meet the “austere” requirements of the Immigration Rules as she did not have leave to remain as a fiancée for more than six months, there was a genuine marriage to a British citizen and an insuperable obstacle to the parties’ cohabitation together in New Zealand. The couple had been living together since April 2012 and the appellant was given discretionary leave to remain after her pregnancy when her status as a spouse was known. There was nothing else to her discredit and the public interest was confined to enforcement of immigration control by requiring her to leave and apply for entry clearance as a spouse from New Zealand.
4. Mr Justice Blake also commented that, although there were no live children of the marriage, the circumstances suggested a particular dependency which was financial and otherwise on the appellant’s husband and that, alone, might have met the test of some other compelling reason for the Upper Tribunal to re-examine the merits of the decision. Noting that the application for judicial review had been delayed from May 2014 to January 2015 because the papers had been mislaid by the court, he granted permission for the circumstances, as they now are, to be re-examined.
5. Following the quashing of the refusal to grant permission, the Vice President of the Upper Tribunal granted permission to appeal on 21st May 2015. The matter came before me on that basis.

Error on a Point of Law

6. Mr McVeety agreed that the appellant’s application had failed solely because of the specific eligibility requirements set out in paragraph E-LTRP.2.1 of Appendix FM which provided that an applicant must not be in the United Kingdom with valid leave granted for a period of six months or less (save for the exceptions in the provision which could not apply to her). She otherwise met the requirements of the Rules particularly the financial requirements and documentary provisions set out in Appendix FM-SE.
7. Ms Lee referred me to financial information which, Mr McVeety also agreed, showed that a gross annual income figure for the appellant’s sponsor of £19,964.02 had been shown. Ms Lee also pointed out that the appellant was unable to take the benefit of the provisions of section EX.1 because of the short period of leave granted to her.
8. Ms Lee submitted that the error in the First-tier decision was that the judge appeared to have ignored the material before him relating to finances which would, otherwise, have brought the appellant within the provisions of Appendix FM and FM-SE. That was relevant when considering the decision of the House of Lords in *Chikwamba v SSHD* [2008] UKHL 40 as to whether or not it would be justifiably harsh and therefore disproportionate to expect the appellant to return to New Zealand and apply for entry clearance from there as a spouse. Mr McVeety conceded that the financial position of the parties was relevant to any decision made with reference to *Chikwamba*.

9. After considering the matter for a few moments I indicated that I was satisfied that the decision showed a material error on a point of law. I reached that conclusion on the basis of the brief submissions made to me and the concessions made by Mr McVeety. Although it is clear that the judge considered the decision of the House of Lords in *Chikwamba*, he did so without any reference to the appellant's financial position. In *R (On the application of Chen) (Appendix FM-Chikwamba – temporary separation – proportionality) IJR* [2015] UKUT 00189 (IAC) the Upper Tribunal made reference to the decision in *Chikwamba* stating that there may be cases in which there are no insurmountable obstacles to family life being enjoyed outside the UK but where temporary separation to enable an individual to make an application for entry clearance may be disproportionate. It is for the individual to place before the respondent evidence that such temporary separation will interfere disproportionately with protected rights. The House of Lords decision identified certain relevant considerations before reaching conclusions about the proportionality of the decision including the immigration history of the applicant and the prospective length and degree of family disruption. Bearing in mind that the judge did not appear to have given full consideration to relevant factors, including the appellant's financial position and, as observed by Mr Justice Blake, her dependency financial or otherwise on the sponsor, the judge erred such that the decision should be re-made.

Re-Making the Decision

10. After hearing further submissions I announced that I would allow the appeal on human rights grounds and now give my reasons for doing so.
11. I heard further submissions concerning the proportionality of the respondent's removal decision in circumstances where the appellant could have made a successful application if it were not for the six month provision.
12. Ms Lee argued that it was not reasonable to expect the appellant to return to New Zealand not only because of her favourable financial situation but because she had suffered the loss of her daughter at the time of the respondent's decision and relied upon the sponsor for emotional support. My attention was also drawn to pages 204 to 209 of the appellant's bundle concerning mental health issues involving anxiety and depression relating, in part, to abuse in New Zealand. It was pointed out to me that the appellant had no home in New Zealand and no contact with other relatives there. Page 244 of the bundle was evidence to show that the processing time for an application from New Zealand would be at least 24 weeks.
13. Mr McVeety made no detailed submissions save to indicate that it was possible that the decision in *Chikwamba* could benefit the appellant.
14. The relevant circumstances of this appeal are not in issue. The appellant is the spouse of the sponsor with whom she evidently has a subsisting relationship which has suffered the tragedy of the loss of a child. She has a faultless immigration history and only failed to succeed in her application for further leave to remain because the balance of the period of discretionary leave granted to her at the time of her pregnancy was less than six months. Otherwise she could comply with all the provisions of the Immigration Rules for leave to remain as a partner.

15. In *EB (Kosovo)*[2008] UKHL 41 the House of Lords recognised, in line with the *Chikwamba* decision that it would rarely be proportionate to uphold an order for the removal of a spouse if there is a close and genuine bond with the other spouse and that spouse cannot reasonably be expected to follow the removed spouse to the country of removal. With that principle in mind and taking account of the exceptional circumstances of this case I conclude that it would be disproportionate to force the appellant to return to New Zealand to make an entry clearance application from there. I bear in mind that, in addition to the favourable financial position of the parties, the appellant has lost her contacts in New Zealand, suffers from mental difficulty and could not be assisted in New Zealand by the presence of the sponsor because of his legal inability to enter that country. I also believe that the provisions of Section 117B of the Nationality, Immigration and Asylum Act 2014 can avail the appellant. She speaks English and clearly will be financially independent when living here. Further, her relationship was established at a time when she had leave to be in the United Kingdom.
16. Having regard to the factors which I have identified I conclude that the appeal can be allowed on human rights grounds.

Notice of Decision

The decision of the First-tier Tribunal shows an error on a point of law. I set aside that decision and re-make it by allowing the appeal on human rights grounds.

Anonymity

Anonymity was not requested nor do I consider it appropriate in this case.

Signed

Date

Deputy Upper Tribunal Judge Garratt

TO THE RESPONDENT
FEE AWARD

Although I have allowed this appeal I do not make a fees order. That is because it was evident that the respondent's decision was reached in good faith based upon an interpretation of Article 8 law which, at the time of the making of the decision, was open to her.

Signed

Date

Deputy Upper Tribunal Judge Garratt